***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-7447

# United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket No. 75-7447**

MADELINE ERIA, Individually and as Administratrix of the goods, chattels and credits which were of VINCENT M. ERIA, deceased,

*Plaintiff,*

—against—

TEXAS EASTERN TRANSMISS. [illegible] CORP., TEXAS EASTERN CRYOGENICS, INC., BROWN & ROOT, INC., NAPP GRECCO COMPANY, BATTELLE MEMORIAL INSTITUTE, THE DOW CHEMICAL COMPANY, G. T. SCHJELDAHL, INC. and E. I. DUPONT DENEMOURS & CO.,

*Defendants.*

TEXAS EASTERN TRANSMISSION CORPORATION and TEXAS EASTERN CRYOGENICS, INC.,

*Defendants-Appellants,*

—against—

THE DOW CHEMICAL COMPANY,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF OF DEFENDANTS-APPELLANTS

LEBOEUF, LAMB, LEIBY & MACRAE
*Attorneys for Defendants-Appellants*
140 Broadway
New York, New York 10005

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### Preliminary Statement

The United States District Judge who issued the order under appeal is the Honorable Mark A. Costantino.

## Statement of Issues Being Presented for Review

Whether the injunction contained in the Memorandum and Order of August 1, 1975 which enjoined appellants Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. from proceeding with discovery against appellee The Dow Chemical Company in a state court action pending in the District Court of Harris County for the 157th Judicial District of Texas is prohibited under the terms of Title 28, United States Code, Section 2283.

## Statement of the Case

On February 10, 1973, a fire swept through an empty liquefied natural gas storage tank located in Staten Island, New York, owned by Texas Eastern Cryogenics, Inc. and operated by Texas Eastern Transmission Corporation (hereafter collectively referred to as "Texas Eastern"). The tank, which was insulated by an allegedly "non-burning" plastic material manufactured and sold by appellee The Dow Chemical Company ("Dow") was at the time undergoing repairs (A, p. 37a).* The fire left forty workmen dead and caused more than 45 million dollars in property damage to the facility (A, p. 41a).

The survivors of the workmen thereafter commenced actions against Texas Eastern, Dow and others for personal injury and wrongful death in federal and state courts. Among these personal injury and wrongful death actions is the present action in the Eastern District of New York (hereafter referred to as the "Federal Court action").

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* Citations noted in this manner are to the Appendix to this appeal.

Texas Eastern as a defendant in the Federal Court action cross-claimed against Dow, among others, for contribution.

In February, 1975, Texas Eastern filed a complaint against Dow in the District Court of Harris County for the 157th Judicial District of Texas for property damages resulting from that fire (hereafter referred to as the "State Court action") (A, p. 22a). Later the complaint in the State Court action was amended to name Battelle Memorial Institute ("Battelle"), a contractor involved in the repairs, as an additional defendant (A, p. 118a).*

In the Federal Court action, Texas Eastern's interests have been represented by the law firm of Mendes & Mount, counsel designated by its insurers. In the State Court action, Texas Eastern is represented by its own counsel, as well as counsel for the insurers of its property loss, the law firm of Clausen, Miller, Gorman, Caffrey & Witous of Chicago, Illinois (A, p. 42a).

Settlement discussions were held in the Federal Court action between plaintiffs and defendants and among defendants themselves until January of 1975, at which time these discussions were aborted. At that time, the Judge assigned in the Federal Court action, the Honorable Mark A. Costantino, fixed June 2, 1975 as the date for trial of the action with pretrial discovery to be completed before that time. Pretrial discovery in the Federal Court action commenced soon thereafter, with various parties serving interrogatories and, at plantiff's request, depositions of Texas Eastern personnel were begun (A, p. 62a). The depositions of Dow personnel were to follow those of Texas Eastern and certain other defendants (A, p. 63a).

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* Battelle is also a named defendant in the Federal Court action.

On March 4, 1975, Texas Eastern obtained leave from the Honorable Arthur F. Lesher, Jr., Presiding Judge in the State Court action, to commence depositions of three Dow employees in Houston, Texas on March 21, 1975 (A, p. 64a). The same day, Dow obtained *ex parte* an order from Judge Costantino directing Texas Eastern to show cause why an order should not be entered, pursuant to 28 U.S.C. §2283, enjoining Texas Eastern from proceeding with the State Court action (A, p. 15a). In support of its application Dow argued that the State Court action had been brought to harass and vex Dow (A, p. 20a). Texas Eastern submitted answering papers to the Court demonstrating that 28 U.S.C. §2283 barred the type of federal judicial interference in state court proceedings as was being proposed by Dow (see A, p. 2a).

Thereafter, Dow made a further application for a temporary restraining order in the Eastern District claiming that its three employees scheduled for depositions to commence on March 21, 1975 in Texas were "necessary and vital as consultants" in the Federal Court action, that it could not prepare for a June trial in federal court if it simultaneously had to comply with discovery demands in the State Court action (A, pp. 50a, 51a), and seeking specifically to restrain those depositions (A, p. 46a). At the hearing on these applications on March 10, 1975, Judge Costantino stated that he would issue an order enjoining discovery in the State Court action to prevent interference with preparation for the June 2nd trial date in the Federal Court action (A, p. 60a). No such order was, however, entered at that time.

On March 12, 1975, the parties again appeared before Judge Costantino, who once again emphasized his deter-

mination that the Federal Court action would go to trial on June 2, 1975:

> "... I have come into what I call legal opportunity and that means I am going to exercise the power I have as a federal judge to make sure this case proceeds on June 2d and regardless of turbulent waters of the seas coming through the courtroom door with a witness on the stand, this case will proceed" (A, p. 88a).

Judge Costantino directed the parties to enter into discussions seeking a mutually agreeable solution to their dispute over the allegedly simultaneous discovery in both forums (A, p. 89a). Since it was at the time anticipated that Dow personnel would, in all events, be deposed prior to the June 2nd trial date and that a conflict would arise only if that trial date were adhered to (so that trial would commence immediately following the conclusion of depositions in the personal injury cases in the spring of 1975), the parties agreed to attempt to resolve their differences by combining the then scheduled Federal Court depositions with the State Court depositions. Following discussions between counsel Dow agreed that it would, prior to the June 2nd trial date in the spring and immediately following their depositions in the personal injury cases, make available its personnel for depositions in connection with the property damage suit, unless the June 2nd trial date continued to be, at that time, a firm one. The parties then reappeared before Judge Costantino and Mr. Briggs, counsel for Texas Eastern, read the following stipulation into the record:

> "Mr. Briggs: If at the end of the depositions of Dow witnesses this Spring, it appears that this trial will go forward in June as now scheduled, discovery in the Texas action will await the end of this trial.

> If for any reason at the end of the depositions of Dow witnesses this Spring, it should appear that trial will not go forward in June Dow will make its witnesses available in New York for depositions in the Texas case immediately following examinations of those witnesses by the parties in this case" (A, p. 92a).

At the close of the hearing on March 12, Judge Costantino announced that he would hold Dow's Section 2283 motion in abeyance (A, p. 93a).

On March 14, 1975, Judge Costantino issued an Order incorporating the stipulation which had been read into the record on March 12 (A, p. 94a).

On March 21, 1975, a further Memorandum Decision was issued by Judge Costantino stating that:

> "Title 28, United States Code, section 2283, the 'anti-injunction' statute, clearly indicates that federal courts should refrain from enjoining state court proceedings unless special circumstances are shown. On March 12, 1975 the parties to this motion stipulated that discovery in the Texas action would await the completion of the trial now scheduled for June 2, 1975 in the New York federal action. That stipulation was 'so ordered' on March 14, 1975. Because of that stipulation, consideration of the 2283 motion will be held in abeyance until after the trial of the federal action or until such time as any conflict or difficulty with regard to simultaneous proceedings in both actions are brought to the court's attention" (A, pp. 99a, 100a).

Since Judge Costantino's Memorandum Decision appeared on its face to overstate the scope of the parties' stipulation, counsel for Texas Eastern so advised Judge Costantino by letter of March 31, 1975 (A, p. 101a). The

letter made clear, as had the actual stipulation, Texas Eastern's intention that "in the event the trial does not commence as scheduled [on June 2, 1975], then discovery in the State Court action will go forward" (A, p. 102a). The letter requested Judge Costantino to rule on Dow's then pending §2283 motion should his understanding of the March 12 agreement differ from that stated in the letter (*Id.*).

Shortly following Judge Costantino's Memorandum Decision of March 21, 1975, Dow brought on for hearing in the State Court action a plea in abatement seeking to abate all proceedings in deference to the pending litigation in the Eastern District (A, p. 135a). This plea was heard in Texas by Judge Lesher on May 19, 1975 at which time Dow offered evidence of alleged conflicts and harassment resulting from the simultaneous pendency of the two proceedings (*Id.*). Following this hearing, Judge Lesher denied the plea in abatement (*Id.*).

Depositions of Texas Eastern personnel continued in the Federal Court action throughout the spring and into the summer (A, p. 108a). The June 2nd trial date was adjourned by Judge Costantino (*Id.*). No depositions of Dow personnel were conducted in the spring in the Federal Court action and Dow failed to make its personnel available to Texas Eastern for depositions in connection with the property damage litigation (*Id.*).

June 2nd having passed without trial of the Federal Court action, Texas Eastern served in July, 1975 a Notice to Take Oral Depositions of Dow in the State Court action, with depositions to commence on August 14, 1975. Dow chose not to pursue its remedies in the State Court action, but sidestepped that court. Instead, Dow's New York counsel

asked Judge Costantino to interfere with the Texas action depositions. Dow's letter to Judge Costantino, dated July 16, 1975 urged the points which it had unsuccessfully argued to the Texas court: that Dow could not undergo simultaneous discovery in both the federal and state forums (A, p. 104a). Dow took the position that under the March 12 stipulation Texas Eastern had agreed that it would not depose Dow witnesses in the property damage action until after they had been deposed in the personal injury action *whenever that took place* (A, p. 103a).

Texas Eastern responded with a letter dated July 21, 1975 noting that Dow had failed to live up to the March 12, 1975 stipulation which provided for the depositions of Dow witnesses "in the Spring" of 1975, that the determinative June 2nd date was now long past and that, as a result, the stipulation had no bearing on the present situation:

> "Since the conditions which gave rise to the stipulation and to which it was addressed, namely, a June trial and depositions of Dow to be held in the Spring, have not occurred, the stipulation has no bearing whatsoever on the present efforts to commence discovery in Texas" (A, p. 108a).

As a result, Texas Eastern requested that Dow's application to enjoin the State Court proceeding under the authority of Section 2283 be denied (A, p. 109a).

On July 23, the parties appeared before Judge Costantino for oral argument on Dow's application to enjoin Texas Eastern from proceeding with depositions in the State Court action. At that time Judge Costantino indicated that he would enjoin Texas Eastern from proceeding with discovery in Texas, stating that:

> ". . . this lawsuit is going to take priority over that lawsuit and is going to be completed and going to be tried this year. That's the position the Court is going to take. It's not going to stand for any other petitions or proceedings in any other court or any other state. That's the Court's ruling on it" (A., p. 131a).

On August 1, 1975 Judge Costantino issued a Memorandum and Order enjoining Texas Eastern, purportedly pursuant to the March 12 stipulation, from noticing discovery in the State Court action in Texas until the completion of depositions of Dow witnesses in New York in the Federal Court action (A, p. 139a). On August 4, 1975, Texas Eastern filed Notice of Appeal (A, p. 144a).

On August 4, 1975, Texas Eastern served on all parties a Notice of Motion in this Court for a stay of Judge Costantino's August 1, 1975 Memorandum Decision and Order pending appeal. Argument on this motion was had on August 12, 1975 before a panel of this Court consisting of Oakes, Van Graafeiland and Meskill, JJ. The motion for a stay of the injunction pending appeal was denied. On August 28, 1975, Texas Eastern moved for reconsideration of its motion for a stay of the injunction pending appeal, and this motion for reconsideration is pending. On September 23, 1975 this Court granted Texas Eastern's motion for an expedited appeal.

## Argument

### POINT I

**Title 28, Section 2283 of the United States Code clearly prohibits the injunction granted by the District Court.**

The injunction granted by the District Court below clearly contravenes both the letter and intent of 28 U.S.C. §2233.* The facts of this case offer no grounds upon which a federal court could validly enjoin the State Court action under Section 2283.

Title 28, Section 2283 is a statute designed "to prevent needless friction between state and federal courts." ** The statute expressly forbids a federal court from enjoining a state court proceeding except in three specifically defined special circumstances.† As is demonstrated below, none of the three exceptions is applicable to the facts in this case.

The provisions of Section 2283 are to be strictly construed. See *Hyde Construction Company* v. *Koehring Co.*, 388 F.2d 501 (10th Cir. 1968), *cert. denied*, 391 U.S. 905 (1968); *Haynes Industries, Inc.* v. *Caribbean Sales Assoc.*,

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* 28 U.S.C. §2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

** *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co.*, 309 U.S. 4, 9 (1939).

† The fact that the injunction sought would issue against a litigant in a state proceeding rather than against the state court itself is of no significance, as the effect is to enjoin a state court. *Id.* See generally, 1A *Moore's Federal Practice* ¶0.208 at 2316.

*Inc.*, 387 F.2d 498 (1st Cir. 1968). The statute provides an "absolute prohibition" against injunctions of state proceedings absent "one of three specifically defined exceptions." *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970); *Mitchum* v. *Foster*, 407 U.S. 225, 228-229 (1972). The *Atlantic Coast* court held that:

> ". . . any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the three specific statutory exceptions to §2283 if it is to be upheld. [398 U.S., at 287.]
>
> * * * * *
>
> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." 398 U.S., at 297.

Only three statutory exceptions to the general prohibition of Section 2283 are stated: injunctions "authorized by an Act of Congress";* injunctions required "to protect or effectuate [Federal] judgments"; and injunctions necessary "in aid of [Federal] jurisdiction." The facts of this case do not fall within any of these three prescribed statutory exceptions.

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* Statutory authorizations within the "congressionally authorized" exceptions of Section 2283 include:

> "(1) [L]egislation providing for removal of litigation from state to federal courts, (2) legislation limiting the liability of shipowners, (3) legislation providing for federal interpleader actions, (4) legislation conferring federal jurisdiction over farm mortgages, (5) legislation governing habeas corpus proceedings, and (6) legislation providing for control of prices." *Mitchum* v. *Foster*, 407 U.S., at 234-235.

There is no congressional authorization for the injunction issued by the District Court.

Nor has it been shown that there is any existing judgment to be protected or effectuated by an injunction. It is settled law that this exception is available only after a Federal judgment has been entered. See 1A *Moore's Federal Practice*, ¶0.224, p. 2616; *Reines Distributors, Inc.* v. *Admiral Corp.*, 182 F. Supp. 226 (S.D.N.Y. 1960), *rev'd on other grounds*, 319 F.2d 609 (2d Cir. 1963); *Fantecchi* v. *Gross*, 158 F. Supp. 684 (E.D. Pa. 1957), *app. dismissed*, 255 F.2d 299 (3d Cir. 1958); *Jos. L. Muscarelle, Inc.* v. *Central Iron Mfg. Co.*, 328 F.2d 791, 793 (3d Cir. 1964) (dictum). No judgment has been rendered by the Federal District Court in this case. This exception to Section 2283 is therefore unavailable to Dow.

The third exception contained in Section 2283, allowing a Federal court to enjoin state proceedings "in aid of" its jurisdiction, is likewise inapplicable. This exception has been narrowly applied and does not authorize injunctions to issue simply on the basis of similarity of parties and subject matter. *Kline* v. *Burke Construction Company*, 260 U.S. 226 (1922).* In the *Kline* case, the court stated:

> "The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. *Stantan* v. *Embrey*, 93 U.S. 548 [1876]; *Gordon* v.

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* *Kline* was decided under two predecessor statutes to Section 2283, Sections 262 and 265 of the Judicial Code. The rule in *Kline* was not changed by the enactment of Section 2283. See *Mitchum* v. *Foster, supra*, at 236, 238 and *Ferguson* v. *Tabah*, 288 F.2d 665 (2d Cir. 1961), at 672.

*Gilfoil,* 99 U.S. 168, 178 [1878] [further citations omitted]. 260 U.S., at 230.

* * * * *

"In *Stewart Land Co.* v. *Arthur,* [267 F. 184 (8th Cir. 1920)], . . . the Circuit Court of Appeals for the Eighth Circuit [stated]:

> 'The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. *Each may take its normal course.*'" 260 U.S., at 232 (emphasis supplied).

See also *Ferguson* v. *Tabah, supra* ("There is no rule of law preventing two *in personam* suits involving the same parties, even if the claims and issues are identical, from proceeding concurrently in [federal and state] courts," 288 F.2d, at 672); *Williamson* v. *Puerifoy,* 316 F.2d 774 (5th Cir. 1963).

Simple differences in the pace of discovery, calendar practice, availability of witnesses and the like between the State and Federal tribunals do not authorize a Federal Court to enjoin the State Court action. In *Vernitron Corp.* v. *Benjamin,* 440 F.2d 105 (2d Cir. 1971), *cert. denied,* 402 U.S. 987 (1971), this Court denied an injunction against a state court proceeding on the ground that injunctions "in aid of" the jurisdiction of a Federal Court are to be awarded only where "a real or potential conflict threatens *the very authority* of the Federal Court," 440 F.2d, at 108 (emphasis supplied). The court so held despite the likelihood that the state court's determination of common issues would have collateral estoppel effect in the subsequent Federal litigation. In fact, the court "welcomed" this result as it tended to "avoid the task of reconsidering issues

which have already been settled by another competent tribunal." 440 F.2d, at 108.*

In short, the District Court's order does not come within any of the statutory exceptions provided by Section 2283.

Furthermore, the trend has been towards more restricted construction of the Section 2283 exceptions. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers, supra; Heyman* v. *Kline,* 456 F.2d 123 (2d Cir. 1972); *Vernitron Corp.* v. *Benjamin, supra.* In *Atlantic Coast Line,* the Court specifically stated:

> "Moreover since the statutory prohibition against such injunctions in part rests on the fundamental Constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." 398 U.S., at 287.

Thus, if the District Court below had explicitly based its Order on one of the exceptions to Section 2283, it would have been so clearly wrong that further argument would be unnecessary to compel reversal. Instead, Judge Costantino has purported to enjoin the State Court action solely on the strength of his misconceived "interpretation" of the March 12 agreement, without making any findings of actual conflict between the Federal Court action and the State Court action. Indeed, Judge Lesher of the Texas State Court, the only judge who has ruled on the merits of Dow's claim that the State Court action is interfering with the Federal Court action, rejected Dow's argument and re-

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* The *Vernitron* court added that on the facts presented:

> "The only conceivable interference here would be an attempt by the state court to determine issues of Federal law, a task which it certainly has not as yet undertaken and which in any event would be wholly without effect." 440 F.2d, at 108.

fused to abate the State Court action. However, as demonstrated in Point III, Judge Costantino's gloss on the March stipulation is so patently erroneous as to constitute in effect, if not in intent, an evasion of the prohibitions of Section 2283.* Under these circumstances, it is clear that Judge Costantino's Order completely disregards the Constitutional policy embodied in Section 2283 and should be reversed.

## POINT II

**The District Court's interpretation of the March 12 stipulation is clearly erroneous.**

In his August 1, 1975 Memorandum and Order, Judge Costantino "interpreted" a practical accommodation which the parties reached at a particular point in time to resolve one specific dilemma as giving him license to enter an order which goes far beyond anything to which the parties ever agreed, and which directs Texas Eastern to do exactly that which the parties stipulated would not be done.

The interpretation of the stipulation now before the Court, urged by Dow and adopted by the District Judge below, is patently erroneous because it assigns no meaning to the words, "this spring," which twice appear in the text of the agreement. These words appear in each of the operative clauses of the agreement and it cannot be assumed that their presence is accidental. The use of the

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* Appellate courts have had to deal before with ill-advised, if well-intentioned, efforts by lower court judges to avoid the prohibitions of Section 2283 by directing their instructions to the parties rather than to the State court involved. *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric Co., supra; Hill* v. *Martin*, 296 U.S. 393 (1935); *Essanay Film Mfg. Co.* v. *Kane*, 258 U.S. 358 (1922).

words, "this spring," as a preface to the operative clauses can only mean that the parties intended to limit the operative effect of those clauses to "this spring." * After spring had passed, and in any event, after the then-scheduled June 2nd trial date had passed, there was no agreement between the parties with respect to coordination of depositions of Dow personnel in the Federal and State Court actions. Thereafter, discovery in each action, including depositions of Dow personnel, would proceed at its own pace.

It is apparent that Dow, at the time the stipulation was entered into, knew that it had not permanently harnessed depositions of its employees in the State Court action to the pace of discovery in the Federal Court action, because shortly thereafter it brought on for hearing in the State Court action a Plea in Abatement, seeking to have the State Court action discontinued because of alleged harassment in having to litigate in both Texas and New York simultaneously. There would have been no need for Dow to bring on the Plea in Abatement in Texas if the March 12th stipulation were operative beyond the spring because there could have been no problem with litigating simultaneously in two jurisdictions if such were the case.

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* At the hearing before Judge Costantino on July 23, 1975, Dow sought comfort in arguing that the stipulation contained the words, "To cover all contingencies" (A, pp. 121a, 122a), when it in fact, did not (A. p. 92a; see also the version of the stipulation in the August 1, 1975 Memorandum Decision and Order, A, pp. 140a, 141a). The stipulation did in fact cover the two apparent contingencies: trial in the Federal Court action by June 2, 1975, in which case the State Court discovery would wait, or no trial by June 2, 1975, in which case the Texas discovery would proceed. Dow would read the stipulation as though each of the last two paragraphs did not contain the words, "this spring."

Under Dow's new and contrary interpretation, incorporated in Judge Costantino's Order, the Federal Court action would always set the pace for depositions of Dow personnel in the State Court action and there would never be any problem of the Dow witnesses having to be at different places at the same time because all depositions of Dow personnel would take place in New York.

Moreover, there is no logical reason why Texas Eastern would agree to a stipulation which would permanently tie the progress of the State Court action to the progress of the Federal Court action. The State Court action and Federal Court action are two separate and distinct lawsuits, one for personal injury and wrongful death damages and the other for property damage. While there is a large body of fact common to both lawsuits since they both arise out of the catastrophic fire on Staten Island on February 10, 1973, nevertheless different interests of Texas Eastern are being represented in each action. This is true if for no other reason than the fact that Texas Eastern's insurers for personal injury damage and property damage are different. More importantly, the possible legal duties owed by Dow to plaintiffs in the personal injury action and to Texas Eastern in the property damage action may be different. There may also be a difference in the possible grounds for liability on the part of Dow in each action.

There is no reason to believe that the list of Dow personnel whom Texas Eastern might want to depose would be identical for both the Federal Court action and the State Court action. The actual Plaintiffs' Notice to Take Oral Depositions in the State Court action (A, p. 113a) which

precipitated the Order appealed from suggests the contrary because it calls for witnesses familiar with the organizational structure of Dow, and these witnesses have *not* been noticed in the Federal Court action.

The interpretation of the March 12 stipulation given by the District Judge below is clearly unreasonable in light of both the actual words of the agreement and the intent of the parties at the time the stipulation was entered into.

## POINT III

**The District Court's twisting of the March 12 stipulation as the basis for the injunction cannot serve to evade the restrictions of 28 U.S.C. §2283.**

An examination of the procedural history of Dow's attempts to have the State Court action enjoined indicates that the District Court has been inclined from the beginning to take whatever steps were necessary—including the issuance of an injunction—to insure that the Federal Court action took precedence over the State Court action.

On March 4, 1975, Texas Eastern having obtained leave from the Honorable Arthur F. Lesher, Jr., Presiding Judge in the State Court action, to commence depositions of Dow employees, Dow obtained an Order to Show Cause in the Federal Court action directing Texas Eastern to show why an order should not be entered, pursuant to 28 U.S.C. §2283, enjoining the District Court of Harris County, Texas from proceeding with the State Court action (A, p. 64a).

Thereafter, on March 10, 1975, Dow made application in the Federal Court action for a temporary restraining

order pursuant to FRCP Rule 65, restraining Texas Eastern from proceeding against Dow "in any discovery proceedings of any kind or nature ordered by the State Court in Harris County District Court, Texas"* (A, p. 43a). In support of its application Dow urged that several of its employees were then scheduled to be deposed in the Federal Court action before the June 2nd trial date, and that it could not prepare for the June trial in the Federal Court action if it simultaneously had to comply with discovery demands in the State Court action (A, p. 46a). At a hearing on Dow's Temporary Restraining Order application on the same day, Judge Costantino indicated his willingness to enjoin Texas Eastern from proceeding with the State Court action (see A, p. 60a). He expressed annoyance that Texas Eastern was proceeding with the State Court action and that discovery in the State Court action might interfere, as alleged by Dow, with his ability on June 2, 1975 (A, pp. 56a, 57a). The Court strongly pressured Texas Eastern to join the State Court action with the Federal Court action or else be enjoined from proceeding in Texas.** The Dow attorney was told that he could present an injunctive order for signature on Wednesday, March 12, 1975, at which time some further argument would be permitted (A, p. 60a).

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* This Order was never signed by Judge Costantino.

** Mr. Sifton [Texas Eastern counsel]: Do I have to be forced to submit?

The Court: No, of course not. If you want to stay in Texas, and I have no objection, but I will run my Court as I see fit. You are not going to impose the jurisdiction of Texas on this Court, and you are not going to interfere with the discovery proceedings in New York by having an action in Texas interfere with this Court (A, p. 56a).

On March 12, 1975, further argument was held before Judge Costantino, who again indicated that he was prepared to issue an injunction against the State Court action in order to insure that there would be no "interference" by proceedings in the State Court action with the then scheduled June 2nd trial date in the Federal Court action (A, p. 88a). However, the parties were able to work out the stipulation and put it on the record, so that injunctive action by the court was unnecessary at that time (A, p. 92a). At the close of the hearing on March 12, Judge Costantino stated that Dow's Section 2283 motion would "be held in abeyance" (A, p. 93a).

The stipulation of March 12 was embodied in an Order signed by Judge Costantino on March 14, 1975 (A, p. 94a).

On March 21, 1975, exactly one week later, Judge Costantino issued a Memorandum Decision (A, p. 99a), *sua sponte,* which recast the terms of the March 12th stipulation. In that March 21st Memorandum Decision, the District Court stated that on March 12th, the parties had "stipulated that discovery in the Texas Action would await the completion of the trial now scheduled for June 2, 1975 in the New York federal action" (*Id.*). This was clearly not the language of the original stipulation of March 12th (see p. 5 of this Brief), nor was it the language contained in the March 14th Order. The effect of this twisting of the language of the stipulation was completely to subordinate the State Court action to the Federal Court action—precisely according to the expressed preference of Judge Costantino (A, pp. 82a-83a).

After the June 2nd trial date had passed and after Texas Eastern had moved to recommence discovery pro-

ceedings in the State Court action, Dow wrote Judge Costantino on July 16, 1975 (A, p. 103a). In that letter, Dow ted the March 21 Memorandum Decision and claim hat there w ag in a conflict between the Federal and State Court actions. Dow for the first time advanced the theory that the March 12th stipulation committed Texas Eastern to refrain from discovery in the State Court action until after depositions of Dow personnel in the Federal Court action were completed (*Id.*). Dow again represented that it could not litigate simultaneously in both forums, and called for a conference before the court to consider the matter.

At the conference held on Jul 23, 1975, the court clung to the version of the stipulation d adopted in its March 21st Memorandum Decision and proceeded to state that it was enjoining discovery in the State Court action pursuant to the stipulation (A, p. 131a). The court made clear its determination that it was going to enjoin discovery in the State Court action in any event:

> "The Court: I may very well use 2283, if I have to. That lawsuit has priority, forty people that were—this lawsuit is going to take priority over that lawsuit and is going to be completed and going to be tried this year. That's the position the Court is going to take. It's not going to stand for any other petitions or proceedings in any other court or any other state. That's the Court's ruling on it" (A, p. 131a).

## Conclusion

The August 1, 1975 Order represents an abuse of the special relationship between federal and state courts envisioned in the Constitution and embodied in 28 U.S.C. §2283, and should be reversed. ". . . [T]he fundamental principle of a dual system of courts leads inevitably to that conclusion." *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, at 297.

Respectfully submitted.

LeBoeuf, Lamb, Leiby & MacRae.

LeBoeuf, Lamb, Leiby & MacRae
*Attorneys for Defendants-Appellants*
*Texas Eastern Transmission Corporation*
*and Texas Eastern Cryogenics, Inc.*
Office and P. O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

*Of Counsel*:

Taylor R. Briggs
Charles P. Sifton
David R. Poe

Dated: New York, New York
September 29, 1975

Certificate of Service

I hereby certify that I have served the foregoing Brief and Appendix of Defendants-Appellants Texas Eastern Transmission Corporation and Texas Eastern Cryogenics, Inc. upon Rivkin, Leff & Sherman, 55 North Ocean Avenue, Freeport, New York 11520, attorneys for Defendant-Appellee The Dow Chemical Company by placing 2 copies of the brief and 1 copy of the Appendix in the United States Mails, first class postage prepaid.

Dated at New York, New York, this 29th day of September, 1975.

David R. Poe

Of Counsel